IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI-ABUJA

SUIT NO: CV/3017/2018

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN
BETWEEN:

1. **NIIMA SHELTERS LTD……CLAIMANT**

AND

1. **FEDERAL MORTGAGE BANK OF NIGERIA**
2. **STALLION HOME SAVINGS AND LOANS LTD** } **DEFENDANTS**

Appearances:

Rotimi Olujide Esq appearing with Olakunle Esq for the 1st defendant.

JUDGMENT

By the originating summons dated the 15th day of October, 2018 and filed the same day by the claimant and whereof the claimant seeks to determine the following question:

> Whether the 1st defendant can resile or take any step outside the purview of the Tripartite Collaborative Agreement between the parties?

The claimant further by the endorsement made on of the summons claims:

> 1) an order restraining the defendants whether personally or through their servants, agents, or privies from taking any action or steps pursuant to the Estate Development Loan granted to the claimant until they comply with the terms of the Tripartite Deed of Agreement entered by themselves.

The defendants having received the processes took a step to file a notice of preliminary objection dated the 14th day of March, 2019.

The grounds upon which the objection was raised include:

i) The facts are hotly disputed and contentious, hence the claim of the claimant cannot be determined on originating summons;
ii) The claimant's action as presently constituted is incompetent;
iii) That this Honourable Court lacks the requisite jurisdiction to entertain the instant suit; and
iv) That the claimant's suit is a gross abuse of Court process.

Along with the Notice of Preliminary objection, the counsel to the defendant also filed a counter affidavit to the affidavit in support of the originating summons dated and filed on the 15th day of October, 2018.

The counsel further filed some annexures to include:

EXH, 'NSL 1' which is an Offer Letter for Estate Development Loan of N184, 274, 350 = made to the Managing Director of the claimant dated the 12th July, 2006;

EXH 'NSL 2' which is a property Development Loan Agreement made between the 1st defendant and the claimant;

EXH, 'NSL 3' which is a Deed of Legal Mortgage made between the 1st defendant and the claimant;

EXH. 'NSL 3A' which is a third party Legal Mortgage created between the 1st defendant and BM Associates Limited (Mortgages) and Niima Shelters Limited (Customer);

EXH 'NSL 5' which is a memorandum dated the 21st day of April, 2015 signed by Shakirat Oyawoye on behalf of the 1st defendant;

In compliance with the rules of this Court, the counsel to the 1st defendant filed a written address which he adopted as his oral argument.

The counsel to the claimant, having received the notice, did not take any step to reply or to respond.

In his notice of preliminary objection, the counsel to the 1st defendant formulated two questions for this Court to determine, to wit:

1) Whether the claimant's suit commenced by originating summons is incompetent, in the face of serious conflict in affidavit and documentary evidence, and therefore liable to be struck out? and
2) Considering the entire case of the claimant, whether same is not an abuse of Court process?

The counsel submitted that jurisdictional issue forecloses hearing of the mater in order to save the precious judicial time of the Honourable Court, and he relied on the case of **APC V. INEC (2015) 8 NWLR (pt 1462) 531 at 555 paras. E – F,** to him, the issue relates to the propriety of the mode of commencement of this action which is not one of interpretation of document or statute, rather it involves serious and conflicting issues of facts both on affidavit and documentary evidence, and that where the facts of a case are hotly contested, the Court does not have jurisdiction to determine such a suit by way of originating summons, and he cited the case of **Inakoju V. Adeleke (2007) 4 NWLR (pt 1025) 423 as 571.**

The counsel further submitted that in seeking for a declaratory relief, a claimant must succeed on the strength of his own case and not on the weakness of the defence, and he cited the cases of **Ajao V. Ademola (2005) 3 NWLR (part 193) 636 Okowa V. COUD (2016) 11 NWLR (pt 1522) 84.** He opined that, having commenced this action by originating summons, the issue of calling oral evidence cannot be done in this case and this has rendered the action incompetent, and he cited the case of **Chairman National Population Commission V. Chairman Ikere Local Government (2001) 13 NWLR (pt 731) 540 at 558 – 560** where the Court held that in **Nwosu V. Imo State Environmental and Sanitation Authority (1990) 2 NWLR (pt 135) 688,** and that in that case the Court acknowledged the authority of such cases as **Falobi V. Falobi, and Akinsele V. Akindutire** went on to say that it is not only by calling oral evidence that such conflict could be resolved, there may be authentic documentary evidence which supports one of the affidavit in conflict with another. The counsel went ahead to put forward before the Court the areas in which the conflict arose to include:

i. Claimant is contending that 'EXH A' to the supporting affidavit is the contracts between it and the 1st

defendant; whereas 1st defendant denies same, and contends otherwise, that the Loan transaction is predicated on EXH 'NLS I' which is the offer Letter for Estate Development Loan of N 184, 274, 350. 00 (One Hundred and Eighty Four Million, Two Hundred and Seventy Four Thousands, Three Hundred and Fifty Naira Only) with **REF NO. FMBN/LAD/EDL/NSL) Vol. I** dated the 12th day of July, 2005; and approved on July 12th 2006

ii. Claimant alleged that it applied for a Loan in 2004 while the 1st defendant denies same and contended that the Loan application as per the content of EXH 'NSL 1' is dated September, 10 2005 and approved on July 12th 2006

iii. Claimant placed heavy and sole reliance on the 'EXH A' as the only contract document, while the 1st defendant contend otherwise asserting that the contract(s) between the parties are mainly being Governed by the following documents which the claimant concealed from the knowledge of the Court, to wit:

(a) EXH 'NSL 1' – offer letter for Estate Development Loan.

(b) EXH 'NSL 2 property Development Loan Agreement (otherwise referred to as Estate Development Agreement);

(c) EXH 'NSL 3' Deed of Legal Mortgage between the Federal Mortgage Bank of Nigeria and Niima Shelter Limited over the property covered by Plateau State R of O No. PL 44930 granted to Prof. Ibrahim Bashir Fidal dated 04/05/2000 and;

(d) EXH 'NSL 3A' – 3rd party Legal Mortgage between the Federal Mortgage Bank of Nigeria and B.M Associates and Niima Shelter Limited over the property covered by Kaduna State Local Government C of O No. KDA/A/0074758 dated 01/06/89 registered at

74758/382/iii at Kaduna, rejected by the NWC (on behalf of the NEC of the party);

v) Claimant is contending vide EXH 'B' to the supporting affidavit that it accessed only the sum of N 98, 274, 350. 00 (Ninety Eight Million, Two Hundred and Seventy Four Thousand Three Hundred and Fifty Naira only) whereas the 1st defendant contends otherwise that by EXH 'NSL 5' additional sum of N 27, 000, 000 = (Twenty Seven Million Naira only) was indeed released to the claimant through the 2nd defendant, bringing the total amount disbursed and accessed by the claimant, to the sum of N 125, 801, 155. 00 (One Hundred and One Thousand, One Hundred and Twenty Five Million, Eight Hundred and Fifty Five Naira);

v) Claimant alleges that the 1st defendant has defaulted from the Tripartite Collaboration Agreement (EXH – A), whereas the later contends otherwise that it did fulfill the expected obligation under the Agreement by a appointing a project Monitoring Consultant to certify the work done at the project site. Rather it is the claimant that is in serious breach of said agreement which is incorporated in the main contract document, by failing to among other things:

a) To provide 30 % funding as equity contribution toward the infrastructural development of the project site of the sum disbursed included part of the cost of infrastructure yet no single infrastructure is in place;

b) To deliver completed housing unit to the nominated Primary Mortgage Institution for National Housing Fund (NHF) packaging as per the terms of the Tripartite Collaboration Agreement;

(I) Claimant is creating a false impression or purportedly

> "extinguishing the balance the Estate Development Loan vide EXH D', whereas the 1st defendant contends otherwise that no single repayment has been made on both the principal amount disbursed and the interest thereon at 10% per annum which continues to run on a daily basis. The defendant counsel made reference to paragraphs 15, 16 and 17 of the counter affidavit as well as EXH NSL 4 annexed thereto.

The counsel then submitted that considering the above identified conflicting affidavit evidence and documents, whether this Court can prefer one person to the other. He answered in the negative, and to him, originating summons is not the proper mode of commencing such an action.

The counsel further made reference to paragraph 8 and 10 of the affidavit in support of the claim to the effect that the claimant admitted to the fact that it is indebted to the 1st defendant, who has now instructed Nord Consult to recover the Loan from it.

The counsel went attend to submit that the motion that object to jurisdiction should only be taken after the statement of claim has been filed is a misconception as issue of jurisdiction can be taken on the basis of the motion or preliminary objection supported by affidavit or evidence received, and he cited the case of **Barclays Bank of Nig. Ltd V. Central Bank of Nig. (1976) I All NLR 409, and National Bank (N.G.) Ltd V. Shoyoye (1977) 5SC 181 at 194**, and further submitted that the procedure to adopt these objection is raised to Jurisdiction in mater commenced by originating summons is to consider both the originating processes and the counter affidavit filed by the objector, and he relied on the case of **Yar'adua V. Yandoma (2015) 4 NWLR (pt 1448) 123 at 161- 162 paras, F – A**, and also the case of **Adeleke V. Osha (2006) 16 NWLR (pt 1096), Dapianlong V. Dariye.**

The counsel urged the Court to sustain the truth and refrain from doing cloistered justice and he cited the case of **Uzodinma V. Izunaso (No. 2) 2011 17 NWLR (pt 1275) 30 at 101 paras. G – H**, and

finally urge this Court to resolve this issue No. I in favour of the 1st defendant/applicant.

On issue No. 2 the counsel to the 1st defendant/applicant submitted that abuse of Legal process is of jurisdictional importance as where a condition for initiating a Legal process is laid down, any suit instituted is contravening of the precondition is incompetent and a Court of Law Lacks jurisdiction to entertain the same, and he cited the case of **Dingydi VS INEC (2011) 10 NWLR (pt 1255) 347**, and he further submitted that the claimant's suit is an abuse as there is no Law in support of it.

The counsel submitted that clause 11.0 of the tripartite collaboration Agreement cleanly spelt out the steps to take in respect to dispute, if any arises, and parties are invariable expected to settle their dispute amicably failing which dispute could be submitted to arbitration, and the claimants failed to tow this path but deliberately dragged the 1st defendant to Court for no just cause, and to him, in any event there is no dispute that has arisen yet, and he relied on paragraphs 35 and 41 of the counter affidavit, and therefore, submitted that where there is no lota of Law supporting a Court process, such can give rise to an abuse of judicial process and therefore urged the court, to be hold that there is an abuse of Court process.

The counsel further submitted that once a Court is satisfied that the proceeding before it constitutes an abuse of Court process, it has the right under section 6 (6) of the 1999 constitution to dismiss it, and he cited the case of **Nweke V. Udobi (2001) 5 NWLR (pt 706) 445 at 461 para – G and Owrikoko V. Arowasaye (1997) 10 NWLR (pt 523) 76.**

The counsel then submitted that this is a clear case of the machinery of justice to exploit the 1st defendant for some advantage so as to run away from the obligation to liquidate debt being owed the bank, and he relied on paragraphs 36, 37 and 41 of the counter affidavit on opposition to the originating summons, and therefore, urged the Court to dismiss the case of being frivolous, oppressive and abuse of Judicial process and he cited the case of **African Insurance Corporation V. JDP Construction Nig. Ltd (2003) 2 – 3 SC at 63,** and humbly urged the Court to dismiss the suit.

Alternatively the counsel to the 1st defendant formulated another issue for this Court, to determine in the event that the 1st defendant is overruled on the preliminary objection, to wit:

> "Whether the claimant/obligor can derogate from its covenanted financial and contractual obligation under the Loan Agreement (Transactions)"?

The counsel submitted that parties should be held to that agreement on the opposite principle of pacta Servenda Sunt, and the claimant must fulfill its obligation under the written contracts between it and the 1st defendant herein, and he referred to the case of **Sonnar Ltd V. Norwind (1987) 4 NWLR (pt 66) 520 at 543 paras. D – E** which the principle Pacta Servenda Sunt was defined to mean contracts are meant to be kept; and the Court went further to hold that agreement which are neither contrary to the Law or fraudulently entered into should be adhered to in every manner and in every detail, and the Court do not make contract for the parties. He also relied on the case of **Adetoun Oladeji (Nig) Ltd V. Nigerian Breweries Plc (2007) L PELR – 160 SC** to the effect that where there is a contract regulating any arrangement between the parties, the main duty of the Court is to interpret that contract to give effect to the wishes of the parties as expressed in the contract documents. He further opined that it is not in dispute that the parties did not reach agreement on in the purported Loan workout with the clamant, and to this he relied on paragraphs 15, 16, and 17 of the counter affidavit, and more particularly EXH 'NSL 4' annexed thereto, on the claimant's indebtedness to the 1st defendant, and he also cited the case of **Kaydee Ventures Ltd V. Hon. Minister of FCT (2010) 7 NWLR (pt 1192) 171.**

The counsel further submitted that the claimant is actually in breach of the contract with the 1st defendant by failing to repay the principal Loan facility obtained and interest thereon for about a decade as the claimant is expected to repay the Loan 24 month inclusive of initial 6 months moratorium which has since lapsed and he relied on clause 4.0 of EXH 'NSL 1' and clause 1.03 of EXH NSL 2 respectively and submitted that these include:

i) The failure to Judiciously apply the Loan to the project;

ii) Failure to deliver completed housing units constructed to finishing level;
iii) Failure to provide 30% funding as equity contribution for infrastructural development as there is no basic infrastructure at the site;
iv) Failure to liaise with nominated primary Mortgage Bank to deliver the packages to NAF subscribers, and to this, he relied on paragraphs 10, 12, 18, 20, 22, 23, 24, 25, 32, 33 and 34 of the counter affidavit, and to him that deliberates to act amounts to discharge of the contracts by reason of the breaches, and he cited the case of **Nwaolisah V. Nwabufon (2011) 14 NWLR (pt 1268) 600 at 633 paras. C – F** where the SC held that a contract can be discharged by breach. A breach of contract means that the party in breach has acted contrary to the terms of the contract either by non performance or by performing the contract not in accordance with the terms or by wrongful repudiation of the contract, and the option open to a party to a valid contract is an action for damage in breach of the contract.

The counsel then submitted finally that the instant proceeding was initiated malafide at the instance of the claimant who is only feigning the false desire to arbitrate on a non – existent dispute, and he referred to paragraphs 35, 36, 37, 38, 39, 40 and 41 of the counter affidavit. He then concluded by urging the Court to refuse the originating summons, as doing so will serve the interest of justice.

Thus, let me at this stage agree with the counsel to the 1st defendant on the position of Law requiring the Court to look at the reliefs of the claimant together with the affidavit in support of the claim and the counter affidavit of the 1st defendant opposing the originating summons. See the case of **Ukpata V. Toronto Hospital nig. Ltd (2010) All FWLR (pt 532) 1711 at 1728 paras. C – D** where the Court of Appeal Enugu Division held that in order to determine whether a mater is properly initiated by originating summons rather than by writ of summons, the Court first of all refers to and examines the reliefs claimed. See also the case of **Yar'adua V. Yandoma (supra)** where the Supreme Court held that the procedure to adopt, where an

objection is raised to the jurisdiction of the Court in a mater commenced by originating summons, is to consider the objection together with the substantive matter. Invariably this would involve the consideration of not only the reliefs being claimed against the background of the facts deposed to, in the affidavit in support of the originating summons, but the totality of available evidence including facts contained in the counter affidavit in opposition to the originating summons.

Thus, the relief sought by the claimant against the 1st defendant is an order restraining the defendants whether personally or through their servants, agents or privies from taking any action or steps pursuant to the Estate Development Loan granted to the claimant until they comply with the terms of the Tripartite Deed of Agreement entered by themselves, and this Court is called upon to determine the following questions:

> "Whether the 1st defendant can resile or take any step outside the purview of the Tripartite Collaborative Agreement between the parties?

It is in the affidavit of the claimant particularly in paragraph 4 that sometimes in the year 2004 the claimant applied for an Estate Development Loan with the 1st defendant which was approved; and by paragraph 5, pursuant to the approval of the application of the Loan, a Tripartite Deed of Agreement between the parties was entered. Paragraph 6 is to the effect that despite the signing of that agreement the 1st defendant defaulted in the release of the agreed sum and the first tranche was made three years after the agreement was signed, and by paragraph 8 it is deposed to the facts that despite defaulting on the agreement. The 1st defendant sometime in 2009 required for a Loan workout in respect of the said Loan which the claimant responded by a letter dated the 15th December, 2009.

It is also in the affidavit of the claimant that the 1st defendant did not take any step in meeting with the claimant but was asking the claimant to repay the sum adduced, and that the 1st defendant has instructed one Nord Consult to recover the Loan from the claimant, and the later wrote a final demand notice, and also the claimant wrote a letter to the 1st defendant requesting for a meeting with a view to sort out issues on the Loan, and this they met

in which the 1st defendant instructed the claimant to submit a Loan Workout to Nord Consult, and the claimant did so. It is also stated that the 1st defendant fall short of the spirit and letter of the Tripartite Deed of Agreement signed by the parties. The 1st defendant filed a counter affidavit dated the 14th day of March, 2019 and the 1st defendant denied paragraphs 4, 5, 6 and 7 of the supporting affidavit to the effect that the claimant Loan application was dated 10th September, 2005 and the whole transaction were predicated on the offer letter for Estate Development Loan of N 184, 274, 350. 00 (One Hundred and Eighty Four Million Two Hundred and Seventy Four Thousand, Three Hundred and Fifty Naira only with reference FMBN/CAD/EDL/NSL/VOL I dated 12th July, 2006 and this was solely for the construction of seventy five housing units two and three bedroom bedroom detached bungalows at Kpakugu, along Minna – Bida Road Minna Niger State at 10% interest rate per annum with a Loan Tenor 24 months, and this represent 100% cost of construction.

Paragraph 8 of the counter affidavit is to the effect that the Loan shall be in three installments of 40%, 30% and 30% in which the first and second tranches of the Loan to the tune of N 67, 220, 740. 00 (Sixty Seven Million, Two Hundred and Twenty Thousand, Seven Hundred and Forty Naira only were disbursed on the 4th February, 2008 while the sum of N 58, 526, 805. 00 (Fifty Eight Million, Five Hundred and Twenty Six Thousand, Eight Hundred and Five Naira only) was disbursed on the 24th February, 2009.

It is also stated in paragraph 11 that the claimant did execute a property Development Loan Agreement otherwise known as Estate Development Loan Agreement, with the 1st defendant in tandem with the offer letter, and that by paragraph 14 is to the effect that the Loan Transaction is secured with equitable Mortgages namely:

i) Deed of Legal Mortgage between the Federal Mortgage Bank of Nigeria.
ii) 3rd party Legal Mortgage between the Federal Mortgage Bank of Nigeria and BM Associates and Niima Shelter Limited and these are referred to as EXH – NSL '3' and NSL '3A'.

It is also in the counter affidavit that the claimant has deliberately neglected to repay the Loan plus the interest in the sum

of N 360, 265, 668. 05 (Three Hundred and Sixty Million, Two Hundred and Sixty Five Thousand, Six Hundred and Sixty Eight Naira, Five Kobo only as at February, 2019, and the interest continues to run on the amount disbursed until fully liquidated as per the Loan contract.

In paragraph 18 it is deposed to the fact that the claimant has willfully ignored the responsibility to deliver completed housing units to the nominated primary mortgage Institute for National Housing Fund (NHF) packaging as per the terms of the Tripartite Collaboration Agreement.

By the paragraph 21 of the counter affidavit it is deposed to the fact that contrary to paragraphs 7 and 8 of the supporting affidavit of the claimant particularly EXH – B thereto, the claimant did access all the amount disbursed so far, through the 2nd defendant (who was nominated by the claimant).

It is also deposed in paragraph 39 of the counter affidavit that the 1st defendant has not terminated or act on breach of the Tripartite Collaboration Agreement and the Loan Agreement (s).

The 1st defendant further filed a further and better affidavit dated the 29th April, 2019 thereby deposing to the fact that the EXH NSL I to EXH NSL 5 have been duly certified and attached being public documents and to issue a certification in respect of EXH NSL 4 as a document produced from the deponent's computer and group's printer.

Now having summarized, the affidavit of the claimant and the relief sought in the original summons, and the counter affidavit coupled with the further and better of the 1st defendant let me examine them accordingly.

The claimant calls for this Court to determine whether the 1st defendant can resile or take any step outside the preview of the Tripartite Collaborative Agreement between the parties and therefore, sought for an order restraining the defendant whether personally or through their servants, agents or privies from taking any action or steps pursuant to the Estate Development Loan granted to the claimant until they comply with the terms of the Tripartite Deed of Agreement entered by themselves, that is to say to order the parties, to subject themselves to Arbitration as agreed by the parties in the agreement.

Let me at this Juncture observe that the claim of the claimant principally and primarily is for this Court to determine whether the 1st defendant can resile from the Tripartite Collaboration Agreement by not resorting to arbitration in resolving dispute.

Let me examine EXH 'A' attached by the claimant which is the Tripartite Collaboration Agreement, and to this, I refer to the case of **Chemiron International Limited V. Egbujuonuwa (2007) ALL FWLR (pt 395) 447 at 458 para. C** where the Court of Appeal Lagos Division held that a Trial Court is at Liberty to look at all exhibits tendered before it in determining a matter.

Before examining EXH 'A' attached, which is the Tripartite Collaboration Agreement. Let me also observe that both the claimant in paragraph 4 of the affidavit in support and the 1st defendant in paragraph 18 of the counter affidavit made reference to the Tripartite Collaboration Agreement.

The claimant attached it, while the 1st defendant did not attach such an agreement.

Let me further observe that looking at the attached copy of the tripartite agreement the Secretary and Director of the 1st defendant did not sign such a Tripartite Agreement.

Thus, clauses 11.0 to 11.3 of the Tripartite Agreement reads:

11. 0 RESOLUTION OF DISPUTES

11. 1 Any dispute arising from or in connection with the agreement shall be settled amicably by the parties here to and under mutually acceptable terms failing which the dispute shall be submitted to arbitration.

11. 2 Any such arbitration shall be conducted in accordance with the Arbitration and conciliation Act Cap A18 Laws of the Federal of Nigeria 2004. The Arbitrators shall be three in number of which one must be a member of the Real Estate Developers Association of Nigeria (REDAN) appointed by the president of REDAN, one member of the Mortgage Bankers Association of Nigerian (MBAN) appointed by the president of MBAN and the third Arbitrator shall be the presiding Arbitrator shall be a Legal Practitioner appointed by the Leader.

11.3 Reference of the dispute to Arbitration shall not constitute any ground for suspension of the terms of this Agreement"

By this, it could be inferred that there exists an arbitration clause in the Tripartite Collaboration Agreement otherwise known as EXH 'A' as attached by the claimant.

Thus, section 1 (1)(a) of the Arbitration and Conciliation Act Cap. A18, Laws, of the Federation of Nigeria, 2004 provides:

(1) Every arbitration agreement shall be in writing contained:

(a) In a document signed by the parties;"

More so section 1 (2) of the Act provides:

"Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract."

By these subsections of section 1 of the Act, it could be inferred to mean that for an agreement to be arbitration agreement, it must be in writing in a document duly signed by the parties, and that any document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing, and such clause becomes part of the contract.

Thus the Tripartite Collaboration Agreement contains an arbitration clause which constitutes an arbitration agreement and such agreement is in writing and such clause is made part of the contract. However, I have to re-iterate further that looking at the face of the document EXH. 'A' Tripartite Collaboration Agreement, it is discernible that the 1st defendant did not sign such a document through its director and secretary.

The question that arose here now, which calls for an answer is:

"Whether this Tripartite Collaboration Agreement is

Binding on the 1st defendant?

The answer, to my mind, is in the negative, this is because it is not signed by the 1st defendant, having looked at the EXH 'A', and this is very glaring and to this, the content of the Tripartite Collaboration Agreement is not building on the 1st defendant, I

therefore, so hold. See the case of **Interdrill (Nig. Ltd) V. U.B.A. (2017) All FWLR (pt 904) p 1181 ratio 6.**

Certainly the existence of the Tripartite Collaboration Agreement was denied by the 1st defendant in paragraph 4 of the counter affidavit, and it reads:

> " I have read the affidavit in support of the said summons deposed to by professor Bashir Ibrahim Lawan on behalf of the Claimant/Respondent and I know for a fact that paragraphs 4, …… thereof are false and incorrect"

By this averment, it could be inferred that paragraph 4 of the supporting affidavit of the document has been denied by the 1st defendant in same paragraph 4 of the counter affidavit, to appreciate this, I call in aid the provision of section 1 (1) (c) of the Arbitration and conciliation Act Cap, A 18, LFN 2004 which provides:

1) Every arbitration agreement shall be in writing contained:
2) In an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another,"

By this provision, it could be inferred to mean that an arbitration agreement shall be in writing and must contain in an exchange of point of claim and of defence and the existence which is not denied by another. In the instant case the 1st defendant is denying the existence of such collaborative agreement which contain arbitration clause, probably this is because such an agreement as exhibited by the claimant has not been signed by the 1st defendant, and to this I so hold.

Now, for the fact that the Tripartite Collaborative Agreement has not been signed can this Court interpret the said document with a view to see whether the 1st defendant can resile from the agreement to resort to arbitration in the event there is a dispute? Certainly, there is no any document to interpret which affects the rights of both parties as the 1st defendant is not involved.

Thus, Order 3 Rule I of the FCT High Court Rules 2018 provisions:

> "Any person claiming to be arising under a deed, will enactment or other written instrument may apply by originating summons for the determination of any question

of construction arising under the instrument and for a declaration of the rights of the persons interested."

On the above quoted provisions, see the case of **Ukpaka V. Toronto hospital nig. Ltd (supra)** where the Court held that originating summons is a well established procedure of filing or instituting suits in Courts, where the issue to be determined by the Court is one that pertains to question of Law, interpretation of statute or instrument made under any written Law or deed of assignment, will, contract or some document or even discretion arising from facts which are substantially not in dispute. See the also the case of **Elelu – Habeeb V. National Judicial Council (2010) All FWLR (pt 536) p. 510 at 535 paras. G – H** this case is of persuasive effect. See also the case of **National Bank of Nigeria V. Alakija (1978) 2 LRN 78** where the supreme Court held that originating summons should only be applicable in circumstances where there is no dispute on question of fact or even the likelihood of such dispute. Also is the case of **Nwoko V. Ekerete (2010) All FWLR (pt 537) p. 792 at 799 paras A – B** where the Court of Appeal Calabar Division held that where the facts of a case are controversial or contentions and cannot be ascertained without evidence being adduced, originating summons cannot be appropriately used, in the instant case. They have joined issues by their affidavit this is because the 1st defendant has denied paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the affidavit in support of the claim and to this, the issues are so substantial.

Based upon the foregoing consideration, I have now come to the conclusion that these are disputes arising from the contract entered between the parties based upon the affidavit evidence and the document attached by the parties and the best way to go by this case is by filing a writ of summons to be accompanied by pleadings. See the case of **Nigerian Reinsurance Corporation V. Cudjoe (2008) All FWLR (pt 414) p. 1538 at 1556 paras. F- H.**

The claim is hereby struck out and the claimant can file his case through writ of summons and pleadings be filed accordingly. See the case of **Johnson V. Mobil Producing (Nig) Unlimited (2010) All FWLR (pt 530) p. 1341 paras. C – D.**

Signed
Hon. Judge
30/09/2019